No. 42863-6-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

IN RE THE PERSONAL RESTRAINT

OF

DYNAMITE SALAVEA,

Petitioner.

REPLY BRIEF

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I. THE STATE CONCEDES THAT THE CHARGES VIOLATED DOUBLE JEOPARDY CLAUSE PROTECTIONS AND THAT THE PRP IS TIMELY FILED

The state concedes the bulk of the arguments in the Opening Brief.

The Opening Brief argued that Counts I and II charged rape of a child in the first degree in the same language, on the same dates – from 1996 to 1998 – and against the same victim, "R.K.T." In that brief, Mr. Salavea argued that the instructions told the jury that it had to be unanimous about each count and had to decide each count separately, but that those instructions did not tell the jury that it must unanimously agree that the act forming the basis for Count I is separate from the act forming the basis for Count II, before convicting. The state agrees that this problem existed – in fact, it concedes: "Were petitioner to have raised his challenge on direct appeal, he might have been entitled to some relief." Response, p. 7.

The same is true of the other double jeopardy claims raised in the Opening Brief. Mr. Salavea argued that Counts III and IV charged rape of a child in the first degree in the same language, on the same dates – from 1996 to 1998 – against the same victim

(who differed from the victim of Counts I-II), that is, "R.U.T." The Opening Brief continued that the jury instructions did not ensure that the jury unanimously agreed that Count III's acts were different from Count IV's acts, before convicting. The state does not dispute that this error occurred, or that it was a constitutional, double jeopardy, problem. In fact, its conclusion that "Were petitioner to have raised his challenge on direct appeal, he might have been entitled to some relief," seems to apply to Counts III and IV, also. Response, p. 7.

Finally, the Opening Brief argued that there was yet another double jeopardy problem, of a different sort – the greater-lesser included offense problem. That brief explained that Count V charged child molestation in the first degree on the same dates and against the same victim, R.U.T., as the dates and victim listed in Counts III and IV. Similarly, Count VI charged child molestation in the first degree on the same dates and against the same victim, R.K.T., as the dates and victim listed in Counts I and II. It further explained that although child molestation in the first degree is not always a lesser-included offense child rape in the first degree, because each crime may contain an element that the other one

does not[1], in this case they were greater and lesser crimes. The reason (as we explained in the Opening Brief) is that according to Jury Instruction No. 10 (Appendix D – Opening Brief), there were no different elements between those crimes in this case. Instead, that instruction told the jury that "sexual contact" and sexual gratification were elements of child rape in the first degree as well as child molestation. Sexual contact and sexual gratification must therefore be considered identical elements of the rape crimes and molestation crimes in this case. So in this case, both molestation charges were lesser-included offenses of the rapes charged in Counts I-IV, because they contained a subset of the elements of the rapes charged in Counts I-IV.[2] The state apparently concedes this point, too. Response, p. 7.

The state does not even dispute the remedy for such double jeopardy violations: either Count I or II must be vacated; either Count III or IV must be vacated; and both Counts V and VI must be vacated. This remedy would drastically affect Mr. Salavea's offender score and, hence, the case must be remanded for

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[1] *State v. French*, 157 Wn.2d 593, 610-11, 141 P.3d 54 (2006).

[2] *See State v. Freeman*, 153 Wn.2d 765, 772, 108 P.3d 753 (2005) (citing *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932)).

resentencing. The state does not dispute that if, indeed, Mr. Salavea has proven a double jeopardy violation that requires a remedy, that that would be the appropriate remedy.

Finally, the state does not dispute that Mr. Salavea's PRP is timely filed. Response, p. 5 ("Petitioner raises a claim that his convictions violate double jeopardy; this claim is [sic] falls under the exception [to the one year time limit] found in RCW 10.73.100(3).").

II. THE STATE'S ONLY ARGUMENT IS THAT MR. SALAVEA FAILS TO PROVE PREJUDICE; BUT IT USES THE WRONG STANDARD FOR DETERMINING PREJUDICE WITH REGARD TO THE GREATER-LESSER INCLUDED OFFENSE DOUBLE JEOPARDY PROBLEM.

The only thing the state argues is that Mr. Salavea failed to prove that these double jeopardy errors caused prejudice. Response, p. 7 ("On collateral review ... he must show that these instructional deficiencies caused him actual prejudice. This he fails to do.").

The first problem with the state's argument is that it uses the wrong standard for determining prejudice. It cites to a state Court of Appeals case and argues that it establishes the rule that when a double jeopardy claim is raised on collateral attack (as opposed to direct appeal), the petitioner must prove prejudice and that to prove

prejudice he has to show "that it is more likely than not that the jury – having heard evidence of numerous acts of sexual intercourse and sexual contact between petition and the two victims – choose [sic] to return verdicts on three separate counts (per victim) using a single underlying act on which to base its verdicts." Response, p. 13. See Response p. 6 (citing *In re the Personal Restraint of Delgado*, 160 Wn. App. 898, 251 P.3d 899 (2011)).

Delgado has never been approved by the state Supreme Court. Still, its holding about how to prove that a double jeopardy violation caused prejudice is far more limited than the state claims. As that decision itself notes, it was limited to the situation where there were multiple convictions of the same sex crime and it was unclear how many sex acts those convictions were based upon. It was not dealing with a situation where there was a conviction of both a greater and a lesser crime arguably based on the same act. *Delgado*, 160 Wn. App. at 909.

The *Delgado* decision itself even acknowledges that its conclusion might not apply in that greater-lesser context. *Id.*, at 910.

The *Delgado* court's acknowledgment was appropriate and necessary. Controlling authority holds that conviction of both a

greater offense and a lesser-included offense violates state and United States constitutional protections against double jeopardy.[3] Controlling authority in both the direct appeal *and collateral attack* contexts also holds that where, as here, conviction of a greater and lesser-included offense occurs, the remedy is to vacate the conviction on the lesser offense.[4] There is no further discussion of prejudice in those controlling cases, even the cited post-conviction cases, in this particular double jeopardy context, that is, the greater-lesser included offense context.

But that is the context that we have here, with regard to Counts V and VI. In those Counts, Mr. Salavea was charged with

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[3] *Brown v. Ohio*, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977) (double jeopardy clause prohibits prosecution of defendant for a greater offense when he has already been tried and convicted of lesser included offense); *State v. Roybal*, 82 Wn.2d 577, 582, 512 P.2d 718 (1973) ("It is sufficient to constitute second jeopardy if one is necessarily included within the other, and in the prosecution for the greater offense, the defendant could have been convicted of the lesser offense."); *State v. Ortiz*, 77 Wn. App. 790, 895 P.2d 845 (1995) ("While the state is entitled to charge and prosecute offenses included within a greater offense, once the jury finds the defendant guilty of the greater offense, the lesser offense becomes merged with the greater offense, and the defendant cannot be found guilty of both.").

[4] *State v. Weber*, 127 Wn. App. 879, 885, 112 P.3d 1287 (2005), *aff'd*, 159 Wn.2d 252 (2006), *cert. denied*, 551 U.S. 1137 (2007); *In re the Personal Restraint of Burchfield*, 111 Wn. App. 892, 899, 46 P.3d 840 (2002).

molestation. As charged and instructed in this case, those were lesser-included offenses of Counts I-IV. Mr. Salavea challenged his convictions on Counts V and VI – the convictions of molestation – on the ground that they were lesser-included offenses of the greater rape crimes charged in other counts. Opening Brief, pp. 26-31.

Thus, even under the analysis advanced in the Response, the convictions of those two counts must be reversed. The reason is that, as convictions of lesser-included offenses, they are not subject to the *Delgado* harmless error analysis at all because they are greater and lesser offenses – even if the other convictions are subject to that analysis.

III. THE STATE ALSO USES THE WRONG STANDARD FOR DETERMINING PREJUDICE WITH REGARD TO THE DUPLICATIVE CONVICTIONS OF RAPE.

But under controlling Supreme Court authority, the other convictions should not be subject to the *Delgado* analysis from Division I, either. The first reason is that we are dealing here with multiple convictions of violating a single statute, not multiple convictions of violating different statutes. The problem here is thus more properly characterized as a double jeopardy problem of the "unit of prosecution" type – because the "unit of prosecution" test is

the one that is applied when a defendant is convicted of multiple counts of violating the same criminal statute. *State v. Adel*, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998).

When applying the unit of prosecution test, the state Supreme Court has never employed a separate harmless error analysis – even in a PRP case. For example, in *In re the Personal Restraint of Davis*, 142 Wn.2d 165, 12 P.3d 603 (2000), the defendant pled guilty to two counts of possession with intent to manufacture marijuana based on grow operations he operated at two separate locations. *Id.*, 142 Wn.2d at 168-69. The Washington Supreme Court ruled that the unit of prosecution for the drug possession-with-intent statute was "a 'separate and distinct' intent to manufacture drugs...." *Id.*, 142 Wn.2d at 175. That Court held that there was no double jeopardy-unit of prosecution violation because the two separate grow operations evidenced two "'separate and distinct' intent[s] to manufacture marijuana at each location ...." *Id.*, at 176. It did not move on to any separate harmless error analysis.

In fact, the state Supreme Court does not employ separate harmless-error analysis even when dealing with double jeopardy problems that do not involve unit of prosecution analysis – even in

a PRP. For example, in *In re the Personal Restraint of Borrero*, 161 Wn.2d 532, 167 P.3d 1106 (2007), *cert. denied*, 552 U.S. 1154 (2008), the Supreme Court held that once a double jeopardy violation is established, no further prejudice need be proven – even in that personal restraint, collateral attack, context:

> Generally, on collateral review a petitioner must make a threshold showing of constitutional error causing actual prejudice or nonconstitutional error that constitutes a fundamental defect inherently resulting in a complete miscarriage of justice. .... Because Borrero alleges constitutional error, he bears the burden of establishing actual prejudice by a preponderance of the evidence. .... However, this burden is waived if the particular error gives rise to a conclusive presumption of prejudice. ... *If, as Borrero contends, he was unconstitutionally punished for two offenses in violation of double jeopardy principles, prejudice is established.*

Borrero, 161 Wn.2d at 535-36 (Numerous citations omitted; emphasis added.) It naturally follows that no further prejudice need be proven in this appellate court, either, once the constitutional double jeopardy violation is established.

This does not mean that the facts of the crime are irrelevant. It means that with unit of prosecution analysis, the determination of whether a double jeopardy violation occurred involves a review of the record to determine whether the charge was correctly brought in multiple counts.

As discussed in the Opening Brief, the charges in Counts I-II and Counts III-IV were not properly brought in multiple counts. The charges themselves were duplicative, and contained no limiting language, dates, names, or other separating features. The jury instructions did not cure that problem. As discussed in the Opening Brief's summary of the evidence, there was never any testimony about the dates on which different alleged rapes occurred. Thus, under the analysis traditionally used by the state Supreme Court to analyze double jeopardy violations of the unit-of-prosecution sort, the charging instrument described a single unit of prosecution.

If this Court were to apply a separate harmless-error test, in addition to its regular unit of prosecution test, it would be doing so for the first time – because the state Supreme Court has never taken that additional step.

IV. EVEN UNDER THE STATE'S STANDARD, MR. SALAVEA HAS PROVEN PREJUDICE.

Finally, even if this Court accepts the state's argument about the standard for proving prejudice, Mr. Salavea must still prevail. The reason is that, as the Opening Brief explained, a review of the transcripts reveals the reason for the lack of clarity in the charging Information and jury instructions was that the evidence was so

unclear. The transcripts show that the evidence on all the charges was presented together as a package, with no real differentiation between the dates or times of any of the charged acts. They also show that the state never clarified which count referred to which act in its closing argument. Opening Brief, pp. 12-17. They show that the jury instructions made the problem worse, by giving the jurors no factual basis for differentiating one crime from another. Opening Brief, pp. 17-19.

The state's basic answer is that if there is *any* possibility that the jurors could have convicted Mr. Salavea based on separate acts, then that should save the multiple convictions. That loose standard finds no support in the controlling Washington Supreme Court PRP double jeopardy cases, such as *Orange*,[5] *Borrero*, and *Davis*. Instead, those cases analyze whether there was a double jeopardy problem in the first place by looking at the charging instrument, the instructions, and whether the evidence was clear enough to save otherwise problematic convictions. They do not uphold convictions on a *chance* that the jurors may have cured a problem that the charging Information and instructions created.

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[5] *In re the Personal Restraint of Orange*, 152 Wn.2d 795, 100 P.3d 291 (2004), *amended* January 20, 2005.

When evaluating PRPs, the Washington Supreme Court often looks to U.S. Supreme Court precedent concerning habeas corpus. *E.g.*, *In re the Personal Restraint of Skylstad*, 160 Wn.2d 944, 950-52, 162 P.3d 413 (2007) (applying U.S. Supreme Court decision concerning when a conviction becomes final for purposes of triggering the time for filing a habeas corpus petition, to determine when conviction becomes final for purposes of triggering the one-year PRP time limit); *In re the Personal Restraint of St. Pierre*, 118 Wn.2d 321, 324, 823 P.2d 492 (1992) (applying federal retroactivity analysis to state PRP; "we have attempted from the outset to try to stay in step with federal retroactivity analysis").

Of particular importance here, the U.S. Supreme Court has ruled that if the court finds itself in "grave doubt" or "equipoise" about whether a post-conviction petitioner has proven that the claimed error is not harmless, "the uncertain judge should treat the error not as if it were harmless, but as if it affected the verdict." *O'Neal v. McAninch*, 513 U.S. 432, 435, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995) ("we consider here the legal rule that governs the special circumstance in which record review leaves the conscientious judge in grave doubt about the likely effect of an error on the jury's verdict. (By 'grave doubt' we mean that, in the judge's

mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error.) We conclude that the uncertain judge should treat the error, not as if it were harmless, but as if it affected the verdict").

Applying that standard here, if this Court concludes – as the state concedes – that there were several double jeopardy problems, and that they likely caused prejudice, then relief must be granted. If, however, this Court finds itself in "equipoise" about the effect of the effect of the conceded double jeopardy problems on the conviction, then relief must also be granted.

V. CONCLUSION

The PRP should be granted; two of the rape convictions and both of the molestation convictions should be vacated; and the case should be remanded for resentencing.

DATED this 5 day of July, 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 5th day of July, 2012, a true and correct copy of the foregoing REPLY BRIEF was served upon the following individuals by depositing same in the United States Mail, first class, postage prepaid:

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